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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS. 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

JAN 06 2004

File: EAC 01 151 52883 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter was then appealed to the Administrative Appeals Office (AAO). On July 10, 2002, the AAO issued a decision dismissing the appeal. The matter is now before the AAO on a motion to reopen/reconsider pursuant to 8 C.F.R. § 103.5. The motion shall be dismissed. The previous decision of the AAO will be affirmed.

The petitioner is a research institute. It has 230 employees and a gross annual income of approximately $13,000,000. The petitioner seeks to employ the beneficiary as a program analyst for a period of three years. The director denied the I-129 petition on the ground that the petitioner failed to submit certification that a Labor Condition Application (LCA) had been properly filed with the U.S. Department of Labor (DOL) prior to the filing of the petition. The director's denial was then appealed to the AAO. That appeal was dismissed by the AAO because the petitioner failed to establish that it had obtained a properly certified LCA prior to the filing of the I-129 petition.

On motion, counsel asserts that on March 23, 2001, he submitted, by fax, a labor condition application to the U.S. Department of Labor. In support of that assertion, counsel submits: a copy of his fax log indicating that a four page document was faxed to DOL on March 23, 2001; and counsel's letter, dated April 6, 2001, further certifying that the LCA was personally faxed by him on March 23, 2001. Counsel then states that the LCA was returned to him by DOL on March 28, 2001, indicating a deficiency in the LCA filing. Counsel responded on March 28, 2001, that DOL had erred in citing a deficiency and supplied corroborating documentation. The LCA was ultimately certified by DOL on October 25, 2001.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5 (a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5 (a)(3). Counsel's submission meets the requirements of a properly filed motion to reopen or reconsider, and shall be adjudicated as such.

The I-129 petition was filed with CIS on April 9, 2001. On June 29, 2001, the petitioner was asked to provide certification that an LCA had been properly filed, completed and endorsed by DOL. On October 30, 2001, the director denied the I-129 petition on the ground that the petitioner failed to submit a properly certified LCA. An appeal of the director's decision was dismissed by the AAO

on the ground that the applicable LCA was certified by DOL on October 25, 2001, subsequent to the filing of the I-129 petition on April 9, 2001.

Section 101(a)(15)(H) of the Immigration and Nationality Act (INA) defines an H-1B nonimmigrant as:

> [A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 212(a)(n)(1) . . . .

Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1), provides that the petitioner shall submit with an H-1B petition " a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." The regulations further provide:

> Before filing a petition for H-1B classification in a specialty occupation the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

8 C.F.R. § 214.2 (h)(4)(i)(B) (1).

Pursuant to 8 C.F.R. § 103.2(b)(12), "an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. . . ." The LCA in this instance was certified by the Department of Labor subsequent to the filing of the nonimmigrant visa petition. The petition must, accordingly, be denied because certification was not obtained prior to the filing of the H-1B petition. The petitioner's good faith effort to obtain certification prior to filing the petition does not relieve it of its obligation to satisfy applicable regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed.